



REPUBLIC OF KENYA



**In re Estate of Mohamed Rashid Salim (Deceased) (Probate & Administration
94 of 1982) [2024] KEHC 12285 (KLR) (16 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 12285 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PROBATE & ADMINISTRATION 94 OF 1982**

G MUTAI, J

SEPTEMBER 16, 2024

IN THE MATTER OF THE ESTATE OF MOHAMED RASHID SALIM (DECEASED)

AND

**IN THE MATTER OF GRANT OF PROBATE TO SALEH
MOHAMED RASHID AND AMINA MOHAMED RASHID**

RULING

1. Grant of probate of the written will of Mohamed Rashid Salim, who died on 1st April 1982 in Mombasa, was issued to Aisha Bint Rashid Bin Salim and Saleh Mohamed Rashid, both of Mombasa, on 25th September 1984.
2. Before the estate could be fully administered, the 1st co-executor, Aisha Bint Rashid Bin Salim, died on 6th May 1993 in Kilimani, Nairobi, after suffering sudden cardiac arrest. The court, upon hearing the application dated 16th February 1996, appointed Amina Mohamed Rashid as a co-executor of the estate of Mohamed Rashid Salim in place of Aisha Bint Rashid Bin Salim and concomitantly confirmed the grant of probate. The order, vide which the grant of probate was confirmed, was issued on 29th April 1996.
3. The Will of the deceased is dated 5th January 1982. The contents of the will, to the extent that they are relevant, are that:-
 1. The deceased, being a Muslim, wished that the whole of his estate, after his death, be inherited under Islamic Sharia;
 2. The deceased also wished to have his estate fully distributed to the heirs upon his demise. To effect his wish, he provided for what would happen if his 1st executor, his wife, died before the estate was fully distributed.
4. Although 28 years have elapsed since the grant of probate was confirmed, the deceased's estate has not been fully distributed.



The Summons for Revocation of Grant Dated 18th September 2023

5. The applicants Swaliha Din Mohamed (hereafter “Swaliha”), Izzat Ali Said (hereafter “Izzat”), Muhsin Ismat Mohamed Rashid (hereafter “Muhsin”) and Habwa Mbarak (hereafter “Habwa”) filed the Summons for Revocation of Grant dated 18th September 2023 vide which they sought the following four orders:-
1. Spent;
 2. Spent;
 3. That the grant of probate issued to Saleh Mohamed Rashid and Amina Mohamed Rashid on the 29th April 1996 be annulled or revoked, on the grounds that the executors have failed to diligently proceed with the administration of the estate and they have failed to distribute the estate to the beneficiaries as required under the Will of Mohamed Rashid Salim (deceased) after more than 26 years when the grant of probate was confirmed by the High Court;
 4. That the costs of the application be borne by the Respondents.
6. The grounds upon which the application was sought were listed in the body of the Summons and in the affidavit sworn by Swaliha on 18th September 2023. It is stated that the executors herein had control of the estate for 39 and 26 years, respectively, and had not distributed the estate to the heirs. The failure to distribute the estate, it was feared, would lead to the dissipation of the estate and give rise to squabbling among the secondary heirs of the estate, further complicating the mode of distribution of the estate. Further, the executors failed to carry out the testamentary wishes of the deceased as provided in his last will and testament.
7. Swaliha deposed that information and financial statements were not shared on time or transparently whenever requested. She stated that Plot No Mombasa/XVI/58 was divided unilaterally by Amina Mohamed Rashid and that the dictates of Islamic Sharia law were not followed. It was further alleged that the 2nd Respondent appointed the caretaker of Plot No MN/VI/2463 without consultation.
8. The Applicants also fear that the executors are old and cannot perform their duties well anymore.

Summons for Revocation of Grant dated 25th September 2023

9. Aisha Rashid Mohamed Rashid Almazrouei, the appointed attorney of Rashid Mohamed Rashid Almazrouei, filed a summons for revocation of grant dated 25th September 2023 in which she sought the following five orders:-
1. “The personal representatives of the estate of the late Mohamed Rashid Salim, namely Saleh Mohamed Rashid and Amina Mohamed Rashid, be compelled to complete the execution of the will of the deceased by distributing the estate to the beneficiaries as per the will of the deceased, within thirty (30) days;
 2. The personal representative of the estate of the late Mohamed Rashid Salim, namely Saleh Mohamed Rashid and Amina Mohamed Rashid, be ordered to produce a full and accurate inventory of the assets and liabilities of the entire estate;
 3. The personal representative of the estate of the late Mohamed Rashid Salim, namely Saleh Mohamed Rashid and Amina Mohamed Rashid, be ordered to render the full and accurate account of the administration of the estate of the deceased from the date when the grant was issued to the date when the account shall be rendered;



4. Should the personal representative of the estate of the late Mohamed Rashid Salim, namely Saleh Mohamed Rashid and Amina Mohamed, default or fail to comply with any of the prayers 1, 2 and 3 above, then the grant of probate issued on the 25th of September 1984 and confirmed on the 29th of April 1996 be revoked on the grounds specified under Section 76 (d) (ii) and (iii); and
 5. That the costs for this application be in the cause.
10. The grounds upon which Aisha's application is based are similar to those relied on in the Summons dated 18th September 2024. Aisha identified the following as having survived the deceased:-
1. Aisha Bint Rashid Bin Salim (widow);
 2. Rashid Mohamed Rashid (son);
 3. Amina Mohamed Rashid (daughter);
 4. Saleh Mohamed Rashid (son);
 5. Ismat Mohamed Rashid (son);
 6. Saada Mohamed Rashid (daughter); and
 7. Afifa Mohamed Rashid (daughter).
- Aisha's father, who donated a power of attorney to her, is Rashid Mohamed Rashid.
11. Aisha deponed that her lawyers wrote a letter to the executors dated 3rd February 2023. The executors responded to her lawyers via a letter dated 17th March 2023, in which they refused to distribute the estate to the heirs and to wind up the process of administration of the estate. She urged that from their conduct, the executors had failed to faithfully administer the estate and that in the circumstances, they ought to be compelled to complete the administration process without delay, failure to which the grant should be revoked and other administrators appointed to complete the administration.

Responses by the Executors

12. The second Co-executor, Saleh Mohamed Rashid, deposed to a Replying Affidavit sworn on 13th March 2024, in which he stated that it was true that he hadn't discharged his duties as an executor. He expressed his readiness to step down on condition that the second co-executor also did so. He blamed old age for the failure.
13. The 2nd co-executor/Respondent, Amina Mohamed Rashid, also known as Amina Ahmed Abdallah (hereafter "Amina"), opposed the application dated 25th September 2023. She, through her counsel, A. A Mazrui & Co Advocates filed a Replying Affidavit sworn on 29th April 2024 in which she stated that upon her appointment, she learned that her co-executor had mismanaged the estate of the deceased to the extent that the Mombasa Municipal Council almost sold some of its assets for non-payment of rates.
14. Amina said she used her resources to save the estate's properties. She averred that the National Land Commission compulsorily acquired Plot No MN/VI/2403 in January 2018. She stated that she was pursuing compensation from the NLC. Payment was delayed by the lack of documentation and the non-cooperation by the heirs, and regarding Plot No Mombasa/XVII/58, Amina stated that she had tried to distribute it without success. She denied that the proposed mode of distribution offended the Islamic Sharia.



15. Amina stated that she managed to dispose of 2 estate Plots in Mwembe Tayari, being Plot Nos. Mombasa/XVIII/123 and Mombasa/XVIII/124 and distributed the proceeds to the heirs. She averred that despite opposition she was willing to conclude the administration of the estate.
16. Amina also opposed the Summons dated 18th September 2023 on the same grounds as those upon which she opposed the Summons dated 25th September 2023. I shall not rehash them here.

Further Affidavit of Swaliha Din Mohamed

17. Swaliha filed a Further Affidavit sworn on 20th June 2024, in which she stated that compensation of the land acquired by the Nation Land Commission would have been completed hadn't the Respondent neglected their duties. She denied that there was an agreement on how Plot No Mombasa/XVII/58 could be divided and accused the 2nd Respondent of uttering false documents. She deposed that the proposed mode of distribution was not per Islamic law and thus did not accord with the wishes of the deceased. He averred that most of the heirs no longer had faith or trust in the Respondents to diligently manage and distribute the deceased's estate according to his last will and testament.

Supplementary Affidavit of Saleh Mohamed Rashid

18. The 1st Respondent filed a Supplementary Affidavit sworn on 19th June 2024 in which he expressed his desire to step down as a co-administrator of the deceased's estate on condition that the 2nd Respondent also did so. He denied that he had been negligent in his duties and blamed his failure to complete the distribution of the estate on his old age and medical condition. He also acknowledged lacking a good working relationship with the 2nd Respondent.

Hearing of the Applications dated 18th and 25th September 2024

19. On 13th February 2024, this Court directed that the two applications be canvassed through Written Submissions. Only the applicants filed their written submissions. The respondents did not.

Written Submissions of Swaliha, Izzat, Muhsin and Habwa

20. The applicants accused the respondents of failing to carry out their testamentary duties by not distributing the deceased's estate to the beneficiaries per the will.
21. They identified two issues as coming up for determination:-
 1. Whether the respondents had properly discharged their duties as executors of the estate; and
 2. Whether the applicants have presented evidence to warrant the revocation or annulment of the grant.
22. Regarding the first issue, it was urged that more than 26 years had lapsed since the grant of probate was confirmed. Counsel submitted that under section 83 of the Law of Successions Act, distribution ought to have been completed within six months of confirmation of the grant of probate. They also urged that the respondents had not been transparent in their dealings with the estate.
23. On the second issue, it was urged that the Respondents failed to diligently proceed with the distribution of the estate, yet more than 26 years had elapsed since it was confirmed. Further, financial statements and bank account statements were not shared in a timely or transparent manner whenever requested.



24. The applicant submitted that the appointment of the caretaker of Plot No MN/VII/2463 was done unilaterally by the 2nd Respondent without consultation and that the said caretaker was only answerable to her. Further, the division of Plot No Mombasa/XVII/58 was done in a manner that didn't adhere to Islamic Sharia.
25. The Applicants relied on the case of *Albert Imbuga Kisigwa v Recho Kawai Kisigwa* [2016] eKLR and in *re Estate of Mwaura Makuro (deceased)* [2021]eKLR.
26. It was thus urged that the grant issued to the Respondents be revoked "for failing to discharge their duties as required and to prevent the further wasting and dissipating of the estate assets."

Submissions of Aisha Mohamed Rashid Almazrouei

27. It was submitted on behalf of the Applicant that the estate had not been distributed for a period of 28 years since the grant of Probate was confirmed. It was urged that the application was grounded on provisions of section 76 (d) (ii) and (iii) of the *Law of Succession Act* and Section 83 of the same Act. The latter provision sets out the duties of the administrators.
28. The applicant submitted that the 2nd respondent's allegation that she had been frustrated lacked basis. It was urged that she had the option of filing an application had that been so since the administration of the estates of deceased persons is done under the directions of the Court. The delay on the part of the administrators was thus inexcusable. The administrators also failed to provide an accurate inventory of assets and liabilities and accounts for all their dealings. Counsels relied on the case of *re Estate of Mwaura Makuro (deceased)* [2021]eKLR
29. The Court was thus urged to order the administrators to complete the administration of the estate within 30 days, failing which the grant would be revoked.

Analysis and Determination

30. I have considered the 2 summons for revocation and/or annulment of the grant, the responses thereto, and the submissions filed by the parties. Has a case been made for the revocation or annulment of the grant?
31. I agree with the counsel for the applicants in the application dated 18th September, 2023 that there are two issues in this matter:-
 1. Whether the administrator's property discharged their duties as executors; and
 2. If not, whether the grant issued to them should be revoked.
32. Before discussing the two issues, I must set out the duties of the personal representatives. Section 83 of the *Law of Succession Act* provides as follows:-

"Personal representatives shall have the following duties

 - (a) to provide and pay, out of the estate of the deceased, the expenses of a reasonable funeral for him;
 - (b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;



- (c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);
- (d) to ascertain and pay, out of the estate of the deceased, all his debts;
- (e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;
- (f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;
- (g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration.
- (h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;
- (i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.

33. I understand the said provision as ordering personal representatives to carry out their duties with diligence and to complete the administration of the estate of the deceased persons within six months. Upon doing so, they have a duty to report to the Court and provide a full and accurate account of their dealings. As executors/administrators, they discharge a function donated to them by the Court and must, therefore, be accountable to it.

Did the Executors Discharge their Duties Diligently?

34. Have the Respondents been diligent, accountable, and transparent in their dealings? To answer this question, I must look at the history of this matter. The grant was confirmed on 29 April 1996, 28 years and four months ago, as of the date of this ruling. The executors had the obligation to distribute the estate within six months. Not doing it within 28 years betrays their lack of diligence.
35. Even if the Respondents experienced challenges, it was open to them to come to Court, but they didn't. In the circumstances, I agree with the applicants' submissions that the executors did not properly discharge their duties.



Should the Grant be Revoked?

36. Revocation and or annulment of grant is done pursuant to section 76 of the [Law of Succession Act](#) which provides as follows:-

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion

- (a) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either
 - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - (ii) to proceed diligently with the administration of the estate; or
 - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- (e) that the grant has become useless and inoperative through subsequent circumstances

37. Mwita J, in the case of [Albert Imbuga Kisigwa](#) (*supra*), discuss the factors that the Court must take into account. In the said case the learned judge stated that: -

“11. The power of the court to revoke a grant of representation whether confirmed or not is donated by section 76 of the [law of Succession Act](#) (the Act). Duties of an administrator are enumerated at section 83 of [the Act](#) and one of the duties is to complete administration of the deceased’s estate within six months from the date of confirmation of grant.

12. The deceased’s estate herein involved a parcel of land which the personal representative was required to distribute. Distribution should be done in accordance with the certificate of confirmation of Grant which must contain identifies of beneficiaries and their respective shares in accordance with section 71 of the Act.

13. Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not a discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when



a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice.

38. It is evident that failure to proceed diligently with the administration of an estate or to provide full and accurate accounts is a ground for revocation of a grant.
39. The need for the provision of accounts was emphasized in the case of *In re Estate of the Late Mwaura Makuro* (Deceased) [2021] eKLR. In the said case E. Ogola, J stated as follows: -
- “ 30. Section 83(e) requires an administrator to within six months from the date of the grant, produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account. Under Section 83(g) an administrator is obligated to complete the administration of the estate in respect of all matters within six months from the date of confirmation of the grant and to produce to the court a full and accurate account of the completed administration.
31. There is no evidence that the administrator completed the administration of the estate within the period specified by law. The administrator has also not filed accounts 6 months from 14th May, 2015 when the Grant was issued or within 6 months from 15th April, 2016 the date of confirmation of the Grant. Section 83(e) and (g) have therefore not been complied with.
32. The production of accounts is a key component of the administration process of a deceased person's estate. From the moment a grant is issued to a personal representative of a deceased person, the grant holder becomes responsible to the Court in the carrying out of the duties of administrator. Accounts are an accountability tool that will tell the Court whether the administrator has been faithful to the role entrusted to him or her. When an administrator fails to file accounts as required, questions as to the integrity of the process are bound to arise as in the present case. The law has empowered the Court on either of its own motion or on the application of any interested party in the estate, to order an administrator to produce a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account.
40. It is evident that in this case, the executors failed to complete the distribution of the estate and to provide the accounts even after a notice was issued to them. I am therefore satisfied that this Court would be justified to revoke the grant.
41. The foregoing notwithstanding, revocation of grant is a draconian remedy that the Court should use sparingly. I note that the 2nd respondent has made efforts to distribute some of the assets of the deceased to the heirs. Given the said circumstances I am inclined to give the executors 60 more days to complete the distribution of the estate. In the event that they are unable, both executors will be removed. Upon their removal, the Public Trusted shall be the sole administrators of the estate.

Final Orders

42. I find and hold that the executors have failed in their duties as executors. In the interest of justices, I give them 60 more days from the date hereof to complete the distribution of the estate. I also order that



once the distribution is completed, and within 60 days of the date hereof, the executors shall produce to the court a full and accurate accounts of the completed administration.

43. If the executors fail to carry out their obligations, as ordered above, within 60 days of the date hereof, then their appointment as executors shall cease forthwith. On the 61st day from the date hereof, in the event that the executors do not complete the administration, the grant shall issue to the Public Trustee.
44. This being a family matter, I make no order regarding costs.
45. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 16TH DAY OF SEPTEMBER 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

Mr Hassan for the Applicant (Application dated 25th September 2023);

Mr Ibrahim for the Applicant (Application dated 18th September 2023);

Mr Salim for the 1st Respondent;

No appearance for the 2nd Respondent; and

Arthur – Court Assistant.

